

REPORT OF THE INDEPENDENT POWER COMMITTEE

I. INTRODUCTION

This Report summarizes the major Federal Energy Regulatory Commission (FERC or Commission) decisions and federal court cases of 1998 pertaining to the Public Utility Regulatory Policies Act (PURPA) of 1978.¹ This Report also contains a summary of amendments to the PURPA regulations and decisions on proposed rulemakings.

II. SUMMARY OF THE FERC DECISIONS UNDER PURPA

A. *Connecticut Valley Electric Co. v. Wheelabrator Claremont Co.*²

The *Connecticut Valley* decision resolved a long-standing conflict between PURPA regulations regarding the “simultaneous buy-sell rule”³ and its case law regarding the sale of gross output by qualifying facilities (QF). In *Connecticut Valley*, the FERC reaffirmed its decision from *Turners Falls Limited Partnership*,⁴ which had enunciated that under PURPA, the sale of QF output in excess of net output would result in loss of QF status. In *Turners Falls*, the FERC concluded that QFs would be permitted to sell gross output under power purchase agreements (PPA) entered into on or before the *Turners Falls* decision (June 25, 1991), but not under agreements entered into after that date.⁵ This was an attempt to avoid the unfair revocation of QF certification of those facilities relying on the ambiguous language of the PURPA regulations prior to the *Turners Falls* clarification.

The *Connecticut Valley* decision also concluded that a facility’s net output should be calculated based on “a rolling-one hour period”⁶ to determine whether the facility makes sales in excess of its net output.⁷ The utility purchasers urged that the hour-by-hour basis should be adopted, while the QFs argued that “net capacity” should be the measure of the limitation on a QFs sale.⁸ The FERC adopted the hour-by-hour basis for calculating net output because it would be more accurate in measuring compliance with PURPA’s limitation than the QFs’ proposal of measuring compliance on an annual basis.⁹ Basically, a QF “cannot

1. 16 U.S.C. §§ 823a-825q-1, 2601-2645, 2701-08 (1998).

2. *Connecticut Valley Elec. Co. v. Wheelabrator Claremont Co.*, 82 F.E.R.C. ¶ 61,116 (1998), *reh’g denied*, 83 F.E.R.C. ¶ 61,136 (1998).

3. 83 F.E.R.C. ¶ 61,136, at 61,411.

4. *Turners Falls Ltd. Partnership*, 55 F.E.R.C. ¶ 61,487 (1991).

5. *Connecticut Valley*, 82 F.E.R.C. ¶ 61,116, at 61,419-20.

6. *Connecticut Valley*, 83 F.E.R.C. ¶ 61,136, at 61,420.

7. *Id.*

8. *Connecticut Valley*, 82 F.E.R.C. ¶ 61,116, at 61,420.

9. *Id.*

sell each hour more than its net output for the hour.”¹⁰ Moreover, measuring on an hour-by-hour basis is more consistent with the FERC precedent on measurement of a facility’s net capacity.¹¹

*B. Public Service Co. of New Hampshire v. New Hampshire Electric Cooperative, Inc.*¹²

In *Public Service Company*, the FERC found that the New Hampshire Electric Cooperative, Inc. (Cooperative) did not need consent from the Public Service Company of New Hampshire (PSNH) to purchase power from QFs that are not directly interconnected.¹³ Rather, the Cooperative is obligated under section 210 of PURPA to purchase power from any QF that can deliver its power to the Cooperative, regardless of direct or indirect interconnection with the Cooperative. These purchases are not subject to the PSNH’s consent.¹⁴ The FERC determined that there was nothing on the face of the service agreement indicating that QF purchases by the Cooperative were limited to QFs to which it had a direct connection. Moreover, section 210(a) of PURPA does not contain such a limitation. Section 210(a) provides that “electric utilities must offer to purchase electric energy from any QF that can deliver power to the utility.”¹⁵ However, the FERC noted that even if PSNH had such a limitation in mind, the parties

cannot lawfully bargain away any portion of the rights QFs enjoy under PURPA or NHEC’s [the Cooperative’s] statutory purchase obligation under PURPA, our implementing regulations, or any rights QFs may subsequently have obtained in the context of the NU [Northeast Utilities]/PSNH merger or the open transmission access requirements of Order No. 888.¹⁶

PSNH also argued that the FERC would, if requested, waive any obligation of the Cooperative to purchase QF power that PSNH would purchase by itself. PSNH reasoned that since it is willing to purchase QF power, purchases by the Cooperative are not necessary to promote cogeneration and small power production.¹⁷ The FERC determined that, even if PSNH provides a market for QF power that the Cooperative might otherwise purchase, the waivers granted in previous cases were requested by those entities with the purchase obligations and

10. *Connecticut Valley*, 82 F.E.R.C. ¶ 61,116, at 61,421.

11. *Connecticut Valley*, 82 F.E.R.C. ¶ 61,116, at 61,420, citing *American Ref-Fuel Co. of Bergan County*, 54 F.E.R.C. ¶ 61,287 (1991) (applying a “rolling one-hour period” for measuring the 80 MW size limitation applicable to QFs).

12. *Public Serv. Co. of N.H. v. New Hampshire Elec. Coop., Inc.*, 83 F.E.R.C. ¶ 61,224 (1998), *reh’g. denied*, 85 F.E.R.C. ¶ 61,044 (1998).

13. *Id.*

14. *Public Serv. Co. of N.H.*, 83 F.E.R.C. ¶ 61,224, at 61,998-99, citing 18 C.F.R. § 292.303 (1998).

15. *Id.* at 61,998.

16. *Public Serv. Co. of N.H.*, 83 F.E.R.C. ¶ 61,224, at 61,998-99 (citations omitted).

17. *Public Serv. Co. of N.H.*, 83 F.E.R.C. ¶ 61,224, at 62,000, citing *Oglethorpe Power Corp.*, 32 F.E.R.C. ¶ 61,103 (1985), *aff’d*, 35 F.E.R.C. ¶ 61,069 (1986), *aff’d sub nom.*, *Greensboro Lumber Co. v. FERC*, 825 F.2d 518 (D.C. Cir. 1987); citing also *Seminole Elec. Coop., Inc.*, 39 F.E.R.C. ¶ 61,354 (1987). In *Oglethorpe* and *Seminole*, the FERC waived the purchase obligation of cooperative utilities at their request where purchases would be made from QFs on those utilities’ behalf. The waivers are granted so long as no QF is deprived of a market for its power at the avoided cost.

mutual interests. The FERC further held that the Cooperative had no obligation to request a waiver.¹⁸ In addition, the FERC would not impose a waiver based on a third-party request.¹⁹ The FERC did not want to circumvent its open access policies by preventing QFs from full participation in the competitive market.

*C. Brazos Electric Power Cooperative v. Tenaska IV Texas Partners, Ltd.*²⁰

In *Brazos*, the FERC held that the thermal output of a QF need not be “economic” in order to be considered “presumptively useful” under PURPA. Brazos Electric Power Cooperative is required to purchase power from Tenaska, a QF, at prices above market rates so long as the plant produces electricity along with steam or other useful forms of energy that can be used for industrial, commercial, heating or cooling purposes.²¹ Brazos claimed, however, that the QF’s output steam is used to distill water sold to the City of Cleburne for a mere ten dollars a month and then disposed of in the sewage system.²² As a result, Brazos requested the FERC to revoke the QF status since its output is not useful. The FERC denied the request, however, finding no statutory requirement that the thermal output be used in an economic manner. So long as the thermal output “constitutes a common industrial or commercial application, [the FERC explained,] it is presumptively useful and the Commission performs no further analysis”²³ The FERC declared that Brazos misunderstood what the FERC means by “presumptively useful.” Brazos was arguing that the presumption is rebuttable, contrary to the FERC’s intention or practice. Thus, the phrase “presumptively useful” was interpreted to mean the facility is capable of generating a monetary gain by using the technology, not that it actually makes money. Brazos is appealing the decision of the FERC’s interpretation to the United States Court of Appeals for the Fifth Circuit.²⁴

*D. Pennsylvania Power & Light Co. v. Schuylkill Energy Resources, Inc.*²⁵

The FERC issued the *Pennsylvania Power* decision one day after the *Brazos* decision. This opinion, like *Brazos*, discussed the “presumptively useful” designation. The FERC applied the same rationale as that in *Brazos*. Schuylkill provides electric power to Pennsylvania Power & Light (PP&L) through its cogeneration facility while providing steam to Reading Anthracite Company (Reading).

Schuylkill gained QF certification in 1986 when the FERC determined that information submitted by Schuylkill regarding the existence of a market for Reading’s anthracite silt met the requirement for “useful thermal output

18. *Public Serv. Co. of N.H.*, 83 F.E.R.C. ¶ 61,224, at 62,000.

19. *Id.*

20. *Brazos Elec. Power Coop. v. Tenaska IV Tex. Partners, Ltd.*, 83 F.E.R.C. ¶ 61,176 (1998), *reh’g denied*, 85 F.E.R.C. ¶ 61,097 (1998).

21. 18 C.F.R. § 292.202(c) (1998).

22. *Brazos Elec. Power Coop.*, 83 F.E.R.C. ¶ 61,176, at 61,725.

23. *Id.* at 61,727.

24. *Brazos Elec. Power Coop.*, 83 F.E.R.C. ¶ 61,176, at 61,727..

25. *Pennsylvania Power & Light Co. v. Schuylkill Energy Resources, Inc.*, 83 F.E.R.C. ¶ 61,188 (1998).

independent of the power production process,"²⁶ to meet the operating standard for topping-cycle cogeneration QF's. However, Schuylkill was required to provide steam to dry at least 194,000 tons of anthracite silt per year, based on eighty-five percent plant availability.²⁷ Schuylkill received its recertification in 1992 when the FERC found the silt drying to be "presumptively useful."

PP&L requested that Schuylkill's QF status be revoked based primarily on insufficient production of silt dried or sold and on Schuylkill's misrepresentation about the marketability of the anthracite silt. The primary issue was whether the thermal output of steam was "useful," thus meeting the requirements of a cogeneration facility.²⁸ As in *Brazos*, the FERC determined that if the use of thermal output "constitutes a common industrial or commercial application, it is presumptively useful and the Commission performs no further analysis regarding the usefulness of the thermal output."²⁹ Moreover, there is no statutory requirement that the FERC determine whether the thermal output of the facility is being used in an economic manner.³⁰ The *Pennsylvania Power* decision employed language similar to *Brazos* and reaffirmed that "presumptively useful" is not a rebuttable presumption. Theoretically, the facility need only be capable of making money.³¹ Although the "useful" requirement was met, qualifying status was revoked based on the facility's failure to satisfy the five percent operating standard.³²

E. *LG&E-Westmoreland Southampton*³³

The decision in *Southampton* clarifies the FERC's July 31, 1996 Order³⁴ announcing a policy of general application concerning the regulatory consequences if a QF fails to meet the FERC's operating standard for a period of time, known as a "period of noncompliance." In the July 31 Order, the FERC held that a QF's rates would be subject to the requirements of the Federal Power Act (FPA) during a period of non-compliance. The applicable just and reasonable rate must be approximately what the facility would have been paid for its power in the absence of PURPA.³⁵ The FERC also found that during any period of non-compliance a QF could remain exempt from federal and state

26. *Pennsylvania Power & Light Co.*, 83 F.E.R.C. ¶ 61,188, at 61,775. Reading uses the output of steam in a drying operation to reduce the moisture content of anthracite silt, which is used as boiler fuel by non-Schuylkill entities. *Id.* at 61,775 n.8.

27. *Id.* at 61,774-5. While originally 210,000 tons per year, based on ninety-nine percent plant availability, Schuylkill filed notice of self-certification to reduce that amount to 194,000 in 1987.

28. *Pennsylvania Power & Light Co.*, 83 F.E.R.C. ¶ 61,188, at 61,778.

29. *Id.*

30. *Pennsylvania Power & Light Co.*, 83 F.E.R.C. ¶ 61,188, at 61,778.

31. *Id.* at 61,779.

32. *Pennsylvania Power & Light Co.*, 83 F.E.R.C. ¶ 61,188, at 61,779-80.

33. *LG&E-Westmoreland Southampton*, 83 F.E.R.C. ¶ 61,182 (1998).

34. *LG&E-Westmoreland Southampton*, 76 F.E.R.C. ¶ 61,116 (1996), *petition for review filed*, No. 96-1358 (D.C. Cir. Sept. 25, 1996).

35. 16 U.S.C. §§ 796, 824a-3 (1994).

regulation (except section 205 of the FPA), provided that refunds are made in accordance with the rate policy announced in the order.³⁶

Two issues were raised on clarification: (1) whether Virginia Electric & Power Company (VEPCO) must compensate Southampton for periods of non-compliance when the unit was subject to dispatch by VEPCO, but not actually dispatched; and (2) Southampton's exempt status during the period of non-compliance. With regard to the exempt status, the FERC merely restated its prior findings from the July 31 Order.³⁷ Regarding the compensation issue, Southampton sought clarification as to how the method for setting rates for periods of non-compliance applies when the unit at issue is not a "must-run unit" and the buyer did not dispatch the unit during all of the hours it was available.³⁸ VEPCO argued that under the July 31 Order, it only needed to compensate Southampton only for those hours the unit was actually dispatched. Southampton argued that it was to be compensated not only for actual energy sales, but also for the capacity value as of the time the unit was available for dispatch.³⁹ The FERC held that VEPCO must compensate Southampton for every hour the unit was available for dispatch, regardless of whether it was actually dispatched, during the period of non-compliance.⁴⁰ This compensation must be based on VEPCO's hourly economic energy costs.⁴¹ The FERC concluded that the facility provided value to VEPCO during every hour that it was available for dispatch. Therefore, Southampton should be compensated for that value.⁴²

*F. Laidlaw Gas Recovery Systems, Inc. and Coyote Canyon Landfill Gas Power Plant*⁴³

In *Laidlaw*, the FERC clarified its February 20, 1996 Order⁴⁴ (February 20 Order) regarding what uses of natural gas, by Laidlaw, in its small power production facility, would be consistent with QF status under the Commission's PURPA regulations. In the February 20 Order, the FERC held that in order for the facility to make a more efficient use of its essential fixed assets, it could burn natural gas to maintain its output at 17 MW. Laidlaw also wanted to maintain its QF status, in three specific circumstances: (1) to maintain plant output when availability of landfill methane is diminished temporarily; (2) to minimize the effects of forced outages; and (3) during periods of landfill maintenance.⁴⁵ However, the FERC refused to permit Laidlaw to burn natural gas in quantities

36. *LG&E-Westmoreland Southampton*, 76 F.E.R.C. ¶ 61,116, at 61,603-05.

37. *LG & E-Westmoreland Southampton*, 83 F.E.R.C. ¶ 61,182, at 61,752-53.

38. *Id.* at 61,751.

39. *LG & E-Westmoreland Southampton*, 83 F.E.R.C. ¶ 61,182, at 61,752.

40. *Id.*

41. *LG&E-Westmoreland Southampton*, 76 F.E.R.C. ¶ 61, 116, at 61,752.

42. *Id.*

43. *Laidlaw Gas Recovery Systems, Inc. and Coyote Canyon Landfill Gas Power Plant*, 84 F.E.R.C. ¶ 61,070 (1998).

44. *Laidlaw Gas Recovery Systems, Inc. and Coyote Canyon Landfill Gas Power Plant*, 74 F.E.R.C. ¶ 61,176 (1996).

45. *Laidlaw Gas Recovery System, Inc.*, 84 F.E.R.C. ¶ 61,070, at 61,293.

sufficient to generate 20 MW, stating "it may not burn natural gas to generate more electric power than the primary fuel available at the landfill (methane) is able to generate."⁴⁶

In *Laidlaw*, SoCal Edison requested clarification of the February 20 Order. The issue was whether it allows Laidlaw to burn natural gas only under the three listed conditions, or whether the order permits Laidlaw to burn natural gas whenever such uses "permit the facilities to make more efficient use of their essential fixed assets."⁴⁷ The FERC clarified that Laidlaw may burn natural gas not only in the three specified circumstances, "but also when burning natural gas will 'permit the facilities to make more efficient use of their essential fixed assets.'"⁴⁸ The FERC interpreted its fuel use regulation⁴⁹ to allow Laidlaw to burn natural gas "up to the 25 percent limit in any calendar year, to make more efficient use of its essential fixed assets, without jeopardizing its QF status, when landfill methane availability is temporarily diminished."⁵⁰

G. *Kawaihae Cogeneration Partners*⁵¹

In *Kawaihae*, Kawaihae Cogeneration Partners (KCP) filed a petition for enforcement under PURPA against the Hawaiian Electric Company (HECO) and the Hawaii Public Utilities Commission (Hawaii PUC). KCP alleged that HECO and the Hawaii PUC violated the PURPA during the process of unsuccessful negotiations, and requested the FERC issue a declaratory order finding that the Hawaii PUC action violated the PURPA regulations and thus is preempted by federal law.⁵² KCP also argued that "the Hawaii Commission has continued to change the criteria for establishing a legally enforceable obligation to sell power to HELCO and has removed any incentive for HELCO to negotiate seriously with KCP."⁵³

The FERC found that section 210(h)(2)(A) of the PURPA⁵⁴ empowers, but does not require the FERC to enforce the requirements of section 210(f) against a state regulatory authority.⁵⁵ The FERC's enforcement authority under section 210(h)(2)(A) is "clearly discretionary."⁵⁶ If the FERC chooses not to undertake enforcement action within sixty days, the petitioner may bring an enforcement action against the state regulatory authority.⁵⁷ Therefore, the FERC denied KCP's petition for enforcement and a declaratory order. The Commission

46. *Laidlaw Gas Recovery System, Inc.*, 84 F.E.R.C. ¶ 61,070, at 61,293.

47. *Laidlaw Gas Recovery System, Inc.*, 84 F.E.R.C. ¶ 61,070, at 61,295, citing 74 F.E.R.C. ¶ 61,176, at 61,615.

48. *Laidlaw Gas Recovery System, Inc.*, 84 F.E.R.C. ¶ 61,070, at 61,296, citing 74 F.E.R.C. ¶ 61,176, at 61,615.

49. 18 C.F.R. § 292.204(b) (1998).

50. *Laidlaw Gas Recovery System, Inc.*, 84 F.E.R.C. ¶ 61,070, at 61,296.

51. *Kawaihae Cogeneration Partners*, 84 F.E.R.C. ¶ 61,325 (1998).

52. *Kawaihae Cogeneration Partners*, 84 F.E.R.C. ¶ 61,325, at 62,455.

53. *Id.*

54. 16 U.S.C. § 824a-3(h)(2)(A) (1998).

55. *Kawaihae Cogeneration Partners*, 84 F.E.R.C. ¶ 61,325, at 62,456.

56. *Id.*

57. *Kawaihae Cogeneration Partners*, 84 F.E.R.C. ¶ 61,325, at 62,456.

characterized KCP's arguments as an example of "the *application* of a [S]tate-established rule that would properly lie before a state judicial forum."⁵⁸ Moreover, the FERC found that the record indicated that other QFs have been able to enter into PPAs with the utilities in question.⁵⁹ The FERC concluded that it is the "Commission's established policy to leave to the states and to appropriate judicial forum issues relating to the specific application of PURPA requirements to the circumstances of individual QFs."⁶⁰

H. *New Charleston Power I, L.P.*⁶¹

New Charleston Power I, L.P., (New Charleston) originally sought a waiver of the Commission's fuel use regulations for the calendar year of 1993 so that it could burn natural gas in amounts in excess of the twenty-five percent limitation without losing its QF status. The FERC denied this request in a June 11 Order explaining that a waiver would not be in the public interest because New Charleston was trying to divert the risks of operational difficulties to ratepayers.⁶² As a result, the facility failed to comply during calendar year 1993. The FERC determined in an earlier order⁶³ that the appropriate rate for the period of non-compliance should be computed based on the *Southampton* methodology.⁶⁴ That is, the parties were "directed . . . to use SoCal Edison's economy energy (incremental) costs in each hour during the period of non-compliance as the basis for computing a just and reasonable rate for wholesale power service" provided in 1993.⁶⁵ Several issues were addressed in *New Charleston* on rehearing.

New Charleston asked the FERC "to clarify that all resources, including must-run units and QF purchases, should be included in determining the highest cost option selected in each hour."⁶⁶ However, SoCal Edison argued that the premise behind the *Southampton* rate policy is to "put the utility in the same position it would have been in had it known that it need not purchase the QF power and could have turned to the economy energy market." The FERC affirmed its

decision to base the rate during hours when the utility purchaser was in low-load situation on the running costs of the utility-purchaser's own must-run units. [Satatin that stated while *Southampton's* policy is] intended to approximate what the facility would have been paid for its power in the absence of PURPA, the rate policy is also

58. *Kawaihae Cogeneration Partners*, 84 F.E.R.C. ¶ 61,325, at 62,456, citing 23 F.E.R.C. ¶ 61,304, at 61,645 (1983) (emphasis in original).

59. *Kawaihae Cogeneration Partners*, 84 F.E.R.C. ¶ 61,325, at 62,456-57.

60. *Id.* at 62,457.

61. *New Charleston Power I, L.P.*, 84 F.E.R.C. ¶ 61,286 (1998).

62. *New Charleston Power I, L.P.*, 83 F.E.R.C. ¶ 61,281 (1998) [hereinafter June 11 Order].

63. *New Charleston Power I, L.P.*, 76 F.E.R.C. ¶ 61,282 (1996).

64. *New Charleston Power I, L.P.*, 84 F.E.R.C. ¶ 61,268, at 62,349, citing 76 F.E.R.C. ¶ 61,116 (1996), order granting clarification and denying reh'g, 83 F.E.R.C. ¶ 61,132 (1998), reh'g pending.

65. *Id.*

66. *New Charleston Power I, L.P.*, 84 F.E.R.C. ¶ 61,268, at 62,350.

intended to provide a just and reasonable rate to the generating unit which fell out of compliance with our QF regulations.⁶⁷

If SoCal Edison had served its load with energy from its own must-run units, it would have incurred the costs of the units. Thus, the FERC believed that "the running costs of a utility's own must-run units provide an appropriate basis for the rate during those hours the utility was in a low-load situation."⁶⁸

The FERC also clarified that there is no intention for QF purchases to be used to calculate the rate during low-load period of a utility's operation.⁶⁹ QF purchases do not provide an accurate reflection of the market in the absence of the PURPA because of PURPA's mandatory purchase obligations. The FERC noted that even if a QF's PPA contained a negotiated rate, as opposed to a rate imposed by a state commission, an imposed avoided cost rate may be reflected in the eventual negotiated QF rate. The result may be a higher rate than would have been negotiated in the absence of PURPA. The FERC did not believe the QF purchases should be used to calculate the rate during periods of non-compliance.

III. SUMMARY OF FEDERAL COURT DECISIONS UNDER PURPA

A. *Grays Ferry Cogeneration Partnership v. PECO Energy Co.*⁷⁰

In *Grays Ferry Cogeneration Partnership v. PECO Energy Co.*, the Federal District Court for the Eastern District of Pennsylvania held that it was without power to adjudicate the merits of a dispute surrounding a PPA entered into by the parties. Grays Ferry Cogeneration Partnership (Grays Ferry) sought a preliminary injunction to enjoin PECO Energy Company (PECO) from breaching and terminating its PPAs with Grays Ferry. This action was taken to compel PECO to pay rates set forth in the agreement and to promptly file an application with the Pennsylvania Public Utilities Commission (PUC) for approval of the PPAs as recoverable costs.⁷¹ The PUC was also a defendant in the case because PECO cited a PUC order, which precluded recovery of costs under the PPAs, as the predicate for terminating the PPAs. The Plaintiff claimed the PUC's preclusion contravened the PURPA, and is thus void based upon the Supremacy Clause of the United States Constitution.⁷²

The court concluded that it lacked jurisdiction, finding no case or controversy between Grays Ferry and the PUC since the PUC had not violated any duty or aggrieved Grays Ferry in any way.⁷³ Moreover, Grays Ferry's claims against PECO did not arise under federal question jurisdiction.⁷⁴ While Grays

67. *Id.*

68. *New Charleston Power I, L.P.*, 84 F.E.R.C. ¶ 61,268, at 62,350.

69. *Id.* at 62,351.

70. *Grays Ferry Cogeneration Partnership v. PECO Energy Co.*, 998 F. Supp. 542 (E.D. Pa. 1998).

71. *Id.* at 544.

72. *Grays Ferry*, 990 F. Supp. at 547.

73. *Id.* at 548.

74. There are three ways in which federal law creates a cause of action: (1) when federal law provides both a substantive right and a remedy for relief; (2) when federal law grants a substantive right and a federal

Ferry invoked the PURPA as the basis of the complaint, "they have not alleged private causes of action against PECO that are either expressly or impliedly created by PURPA."⁷⁵ Rather, the claims against PECO were tort and contract law claims, which are traditional state law claims.⁷⁶ There is no evidence that the federal courts have treated the PURPA as preempting the field of power contracts. Also, nothing in the language or history of the PURPA suggests Congressional intent to grant exclusive federal question jurisdiction over state law claims involving the PURPA.⁷⁷ Finally, Grays Ferry's claims do not turn on a construction of federal law, but rather on state tort and contract law.⁷⁸ Thus, the three criteria for gaining federal question jurisdiction were not met and the court was without jurisdiction.

*B. Crossroads Cogeneration Corp. v. Orange & Rockland Utilities, Inc.*⁷⁹

In *Crossroads Cogeneration Corp. v. Orange & Rockland Utilities, Inc.*, the United States Circuit Court of Appeals, Third Circuit, determined that a state agency's decision under the PURPA has preclusive effect. The dispute arose from a PPA governing the sale of generated electricity by Crossroads Cogeneration Corp. (Crossroads) to Orange and Rockland Utilities (ORU). ORU refused to pay the PPA price for energy generated by a new gas turbine at the Crossroads facility. ORU claimed it was unfair to require it to purchase energy from the new turbine. They did acknowledge, however, that the PPA requires it to purchase "all the capacity produced by the Plant, up to a maximum of 4 MW."⁸⁰

The New York Public Service Commission (NYPSC) asserted jurisdiction and concluded that Crossroads may not supplement electricity produced by its original engine with electricity produced by the new turbine. Thus, the electricity generated by the new turbine could not be priced at the PPA rate. Crossroads filed suit for breach of contract and antitrust violations. The district court ruled that principles of issue and claim preclusion barred Crossroads from litigating the issue of whether the agreement requires purchase of energy from the new turbine. The reasoning was that the issue was litigated and determined before the state commission. The Court also determined that Crossroads' challenge to the NYPSC's jurisdiction was barred by issue preclusion.

Guiding the Third Circuit in *Crossroads* was the criteria of issue and claim preclusion where, "unless a federal statute specifically indicates that state agency decisions should not be considered conclusive, . . . factual findings of

remedy fairly may be implied from that right; and (3) when federal law so thoroughly preempts state law that it converts an ordinary state common-law claim into one stating a federal claim for purposes of the well-pleaded complaint rule. *Grays Ferry*, 998 F. Supp. at 549.

75. *Grays Ferry*, 998 F. Supp at 549 (emphasis added).

76. *Id.*

77. *Grays Ferry*, 998 F. Supp at 550.

78. *Id.*

79. *Crossroads Cogeneration Corp. v. Orange & Rockland Utilities, Inc.*, 159 F.3d 129 (3rd Cir. 1998).

80. *Id.* at 133. ORU contends it was unfair because the rates in the PPA are substantially higher than the market rate. The capacity at Crossroads prior to the addition of the new turbine was 3.3 MW, therefore, ORU had not had to pay for the full 4 MW prior to the addition of the new turbine.

state agencies should be given the same preclusive effect they would be accorded in the courts of that state."⁸¹ Moreover, the court determined that applying preclusive effect to state agency conclusions "is favored as a matter of general policy, [though] its suitability may vary according to the specific context of the rights at stake, the power of the agency, and the relative adequacy of agency procedures."⁸²

The *Crossroads* court determined that the factual findings and legal conclusions of the state agency should be given preclusive effect to the extent allowed under state law. The court held that there is "no provision of PURPA that seeks to limit common law rules of preclusion from applying to state agency decisions relating to utility regulation."⁸³ In fact, the PURPA provides a substantial role to state agencies in regulating energy contracts between utilities and cogenerators. Therefore, the Third Circuit in *Crossroads* concluded that Congress did not intend to prevent the application of common law rules of preclusion. Thus, similar to the New York state courts, the federal courts gives preclusive effect to a state agency's decision.

The *Crossroads* court next considered New York law on issue preclusion. Under New York law, a decision has preclusive effect when: (1) the issue is identical to that decided in a prior proceeding; and (2) "in the prior proceeding the party against whom preclusion is sought was [given] a 'full and fair opportunity' to contest the issue."⁸⁴ The court determined that *Crossroads* was given a full and fair opportunity to contest the issue, but next had to consider whether the issue was "identical" to that considered in the prior proceeding. Resolution of this issue required an examination of the law applicable to *Crossroad's* contract claims and the specific grounds on which the NYPSC rested its decision on the jurisdictional and merits issues.⁸⁵

The court in *Crossroads* first noted that PURPA and FERC regulations have been interpreted to prevent state regulatory commissions from modifying PPA terms after state approval.⁸⁶ Thus, while the PURPA allows the state regulatory agency to approve a PPA, the agency is not permitted to modify the terms of the agreement, once an agreement is approved. In performing such modification or revoking approval, the state agency would be engaging in "utility-type regulation from which PURPA exempts QFs."⁸⁷ Without a waiver of PURPA rights by the QF, federal law prevents a state agency from reconsidering its prior approval.⁸⁸ However, while the state agency cannot reconsider its approval, it does have jurisdiction to "interpret its approval" of the agreement. The court found the NYPSC's holding reflected an interpretation of

81. *Crossroads Cogeneration*, 159 F.3d. at 135 (citations omitted).

82. *Id.*, citing *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 109-10, 111 S. Ct. 2166 (1991).

83. *Crossroads Cogeneration*, 159 F.3d. at 135.

84. *Crossroads Cogeneration*, 159 F.3d at 135 (citation omitted).

85. *Id.* at 137.

86. *Crossroads Cogeneration*, 159 F.3d. at 138.

87. *Crossroads Cogeneration*, 159 F.3d. at 138.

88. *Crossroads Cogeneration*, 159 F.3d at 138, citing *Freehold Cogeneration Associates, L.P. v. Board of Regulatory Comm'rs of N.J.*, 44 F.3d 1178, 1192 (3rd Cir. 1995).

its approval of the PPA, not a reconsideration of its approval.⁸⁹ Thus, the court concluded that the NYPSC did not decide the contract claim urged by Crossroads.

Once a PPA is approved by a state agency, the *Crossroads* court concluded, the parties rights are to be determined “by applying normal principles of contract interpretation to their agreement.”⁹⁰ The district court was asked to determine the intention of the parties under the agreement, with respect to the duty to purchase new capacity, an issue the NYPSC did not address.⁹¹ Finally, the court found that the issue decided by the NYPSC did not have preclusive effect with respect to the contract claim issues presented by Crossroads. Claim preclusion also did not apply because contract claims were not available to Crossroads before the NYPSC.⁹²

IV. PURPA RULEMAKINGS AND REGULATORY CHANGES

*A. Order Terminating Proceeding - Administrative Determination of Full Avoided Costs, Sales of Power to Qualifying Facilities, and Interconnection Facilities (ADFAC)*⁹³

In ADFAC, the FERC exercised its discretion to terminate a rulemaking proceeding initiated in 1987 out of the belief that QF regulations needed to be revised to promote growth of an independent power market. The FERC issued a Notice of Proposed Rulemaking in 1988,⁹⁴ proposing to amend the PURPA regulations to more accurately define guidelines and criteria to be used by state commissions in determining avoided cost.⁹⁵ The proposed rules addressed the difficulty of administratively determining avoided cost, and setting avoided cost rates. The rules also suggested bidding as an alternative that could create “greater efficiency in setting avoided cost rates.”⁹⁶

The FERC exercised discretion to terminate this proceeding. Since the proposed rulemaking was initiated so long ago, the regulations were no longer necessary.⁹⁷ The FERC noted that there have been dramatic changes in the

89. *Crossroads Cogeneration*, 159 F.3d. at 139.

90. *Id.*

91. *Crossroads Cogeneration*, 159 F.3d at 138-9. The Third Circuit did not want to suggest that a court asked to enforce a state approved PURPA agreement will never consider the terms of the agency’s approval. “In some cases, those terms may be highly relevant in determining the parties’ understanding of their respective rights and duties under the contract.” *Id.*

92. *Id.* at 140.

93. *Administrative Determination of Full Avoided Costs, Sales of Power to Qualifying Facilities, and Interconnection Facilities*, 84 F.E.R.C. ¶ 61,265 (1998) (Docket No. RM88-6-000).

94. *Administrative Determination of Full Avoided Costs, Sales of Power to Qualifying Facilities, and Interconnection Facilities*, IV F.E.R.C. STATS. & REGS. ¶ 32,457, 53 Fed. Reg. 9,331 (1998).

95. *Administrative Determination of Full Avoided Costs, Sales of Power to Qualifying Facilities, and Interconnection Facilities*, 84 F.E.R.C. ¶ 61,265, at 62,300, citing IV F.E.R.C. STATS & REGS ¶ 32,457, at 32,157, 32,162-74.

96. *Id.*, citing F.E.R.C. STATS. & REGS. ¶ 32,457, at 32,164-67.

97. *Administrative Determination of Full Avoided Costs, Sales of Power to Qualifying Facilities, and Interconnection Facilities*, 84 F.E.R.C. ¶ 61,265, at 62,302.

industry affecting QFs. One significant change was the enactment of the Energy Policy Act of 1992 (EPAAct). The Act created a new class of non-traditional power producers: wholesale generators (EWGs) that are exempt from the requirements of the Public Utility Holding Company Act of 1935 (PUHCA). The EPAAct also expanded the FERC's authority to order transmission for QFs as well as EWGs.

Another significant change since the proposed rulemaking was the issuance of FERC Order No. 888, which established wholesale transmission open access. Moreover, since 1988, more states have used competitive bidding in some degree to set avoided cost rates. In terminating the proposed rulemaking, the FERC concluded the industry has made "substantial progress regarding the determination of avoided cost and the setting of avoided cost rates."⁹⁸ As a result, the FERC concluded it would be inappropriate to adopt the revisions proposed a decade ago.

*B. Final Rule - Revision of Fuel Cost Adjustment Clause Regulation Relating to Fuel Purchases From Company-Owned or Controlled Source*⁹⁹

In this Final Rule, the FERC amended 18 C.F.R. section 35.14(a)(7) to clarify that

where a regulatory body has jurisdiction over the price of fuel purchased by a utility from a company-owned or controlled source, and exercises that jurisdiction to approve such price, the cost of fuel so purchased shall be presumed,¹⁰⁰ subject to rebuttal, to be reasonable and includable in the fuel adjustment clause.

The rulemaking is in response to an interpretation by the United States Court of Appeals for the District of Columbia that section 35.14(a)(7) establishes a "conclusive presumption" that the price is "just and reasonable."¹⁰¹ The FERC issued the Final Rule to section 35.14(a)(7) to clarify its intention that a rebuttable presumption, rather than a conclusive presumption, would be employed.¹⁰² The FERC made clear that it had no intention of "abdicated its statutory responsibilities" under the Federal Power Act to independently review wholesale rates, including fuel adjustment clauses, subject to its jurisdiction to ensure that they are "just and reasonable." After considering the express congressional mandate to ensure "economical purchase and use of fuel," the FERC determined that section 35.14(a)(7) should be amended so that the FERC is not absolutely barred from inquiring into affiliate fuel prices.¹⁰³

98. *Administrative Determination of Full Avoided Costs, Sales of Power to Qualifying Facilities, and Interconnection Facilities*, 84 F.E.R.C. ¶ 61,265, at 62,301.

99. Order No. 600, *Revision of Fuel Cost Adjustment Clause Regulation Relating To Fuel Purchases from Company-Owned or Controlled Source*, III F.E.R.C. STATS. & REGS. ¶ 31,066, 63 Fed. Reg. 53,805 (1998) [hereinafter *Order No. 600*].

100. *Id.* at 30,721 (summarizing final rule).

101. *Ohio Power Company v. FERC*, 954 F.2d 779 (D.C. Cir. 1992).

102. *Order No. 600*, *supra* note 99, at 30,722.

103. *Id.*

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